YAP THIAM CHOY

v.

SYKT PEMBENAAN FAJAR BARU (REMBAU) SDN BHD

HIGH COURT MALAYA, TEMERLOH
VT SINGHAM J
[CIVIL APPEAL NO: 12-9-2000]
9 AUGUST 2000

CIVIL PROCEDURE: *Jurisdiction - Sessions Court - Transfer of proceedings - From Temerloh Sessions Court to Petaling Jaya Sessions Court - Defendant made a counterclaim against plaintiff - Whether counterclaim alters position of plaintiff to a defendant for purposes of determining where to institute proceedings - 3rd Schedule to the Subordinate Courts Act 1948, s. 2(1)(a) to (e) - Whether the conditions to be read disjunctively*

The plaintiff's address was in Temerloh while the defendant's address was in Petaling Jaya. The plaintiff commenced an action against the defendant for failing to settle the payment for the construction of a Teachers Training College in Besut, Terengganu. In response to the suit, the defendant filed a counterclaim against the plaintiff and thereafter, an application for leave to transfer the proceedings from Temerloh Sessions Court to Shah Alam Sessions Court. After perusing the affidavits and hearing the submission of both parties, the Session Court judge made an order that the proceedings be transferred from Temerloh Sessions Court to Petaling Jaya Sessions Court. The plaintiff appealed.

Held:

[1] The conditions in s. 2(1)(a) to (e) of the 3rd Schedule to the Subordinate Courts Act 1948 should be read disjunctively as the word **"or"** was stated immediately after every condition stipulated therein.

[2] As conditions (b) and (e) of the 3rd Schedule were in favour of the defendant, the proceedings should be heard in Petaling Jaya Sessions Court.

[3] Although the defendant had made a counterclaim against the plaintiff, it did not in any way alter the position of the plaintiff to a "defendant" for the purpose of determining the forum in which the proceedings ought to be instituted.

[Appeal dismissed.]

Case(s) referred to:

Chap Thian Holding Sdn Bhd v. Unknown Person (That Squatted On Lot 392, Lot 393, Lot 511, Lot 513, Lot 514 and Lot 1455, Section 4, Bandar Butterworth, Daerah Seberang Perai, Negeri Pulau Pinang) High Court Taiping, Originating Summons No: 24-52-93 (T) (unreported) ***(foll)***
Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 ***(foll)***
Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(refd)***
Tung Lian Enterprise v. Poly Trading Company [1993] 4 CLJ 189 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b), (c), (d)
Interpretation Act 1948 & 1967, s. 17A
Subordinate Courts Act 1948, ss. 2(1)(a), (b), (c), (d), (e), 99A

For the appellant - CM Lai; M/s Bahari, Choy & Long Chik
For the respondent - Sheron Lee; M/s Ho & Co

Reported by Izzaty Izzuddin

JUDGMENT

VT Singham J:

Appeal

This is an appeal against the decision of the learned Session Court judge, Temerloh wherein Her Honour allowed the application of the respondents/ defendants to transfer the case from the Sessions Court, Temerloh to the Sessions Court, Petaling Jaya.

Statement Of Claim

The appellant/plaintiff had filed an action at the Sessions Court, Temerloh against the respondents/defendants for breach of contract for failing to settle the sum of RM228,454.77 as on 1 June 1998 for contract works carried out for the construction of a Teachers Training College at Besut, Terengganu pursuant to the said contract.

Statement Of Defence

By their statement of defence, the defendants denied the plaintiff's claim and pleaded that the plaintiff had abandoned the contract works by completing only 30% of the construction under the said agreement and had thereby repudiated the agreement by the breach. Consequently, the defendants were compelled to engage another contractor to complete the

contract works which was left incomplete by the plaintiff. The defendants *inter alia*, pleaded that as a result of the breach committed by the plaintiff, they had incurred loss and thereby counter claimed a sum of RM42,337.10 as special damages, other damages and relief.

Application To Transfer Proceedings

In the meantime, the defendants filed an application to transfer the proceedings from the Sessions Court, Temerloh to the Sessions Court, Shah Alam and for stay of proceedings until the disposal of the hearing of the application. The learned Sessions Court judge on hearing the said application and reading the affidavits of both the plaintiff and the defendants and upon hearing both the counsels, ordered on 5 May 2000 the proceedings to be transferred from the Sessions Court, Temerloh to the Sessions Court, Petaling Jaya.

Affidavit Of Defendants

By an affidavit affirmed on 3 November 1999 in support of the application of the transfer of the proceedings to the Sessions Court, Shah Alam, the director of the defendants' company stated the following grounds:

(a) the plaintiff's action was based on the failure by the defendants to settle the plaintiff the sum of RM228,454.77 for the progress works carried out and that the previous seven progress payments were paid to the plaintiff's account at Bank Bumiputra Malaysia Berhad, Kapar, Selangor and exhibited the bank in slips;

(b) since the plaintiff's claim was for the failure to pay the sum of RM228,454.77, the cause of action was within the jurisdiction of the Sessions Court, Shah Alam;

(c) the defendants' business address was No: 36, Jalan 20/16A, Paramount Garden, Petaling Jaya, Selangor;

(d) the defendants' witnesses who are relevant to the case reside around the area of Petaling Jaya;

(e) it is desirable that the case be transferred to the Session Court, Shah Alam for hearing;

(f) the transfer proceedings to the Session Court, Shah Alam will expediate the hearing of the case as the defendants' witnesses will freely and easily attend court and this will save costs.

Affidavit Of Plaintiff

On the other hand, the plaintiff by an affidavit-in-reply affirmed on 2 February 2000 had *inter alia,* stated as follows:

(a) the contract works in respect of the civil action were carried out at Besut, Terengganu;

(b) the completion of the contract works was carried out for the construction of Maktab Perguruan Besut, Bukit Keluang, Besut, Terengganu;

(c) by the defendants counter-claim, the plaintiff has become a defendant in the counter-claim by virtue of the counter-claim, the plaintiff's address as a defendant in the counter-claim is Temerloh;

(d) the statement of account which was sent by the defendants to the plaintiff was addressed to the plaintiff in Temerloh;

(e) the defendants had delayed the filing of the said application;

(f) that the defendants' said application for the transfer of proceedings should be dismissed with costs.

Addresses Of The Parties

Before proceeding to determine this appeal, it is important to note that the plaintiff's address in the statement of claim has been stated as No: 30, Kampung Baru, Temerloh whereas the defendants address as No: 36, Jalan 20/16A, Paramount Garden, Petaling Jaya, Selangor.

Submission Of Plaintiff's Counsel

At the appeal before this court on 20 July 2000, the plaintiff's counsel submitted as follows:

(a) that the learned Sessions Court judge had erred when Her Honour had ordered the proceedings from the Sessions Court, Temerloh to be transferred to the Sessions Court, Petaling Jaya and repeated his submission based on the grounds as stated in the said affidavit of the plaintiff;

(b) as to the issue of jurisdiction, the learned counsel for the plaintiff referred to the case of *Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365 and to the 3rd Schedule (s. 99A) of the Subordinate Courts Act 1948;

(c) that it is a question of fact, whether the summons should be heard in Session Court, Temerloh or ought to be transferred to the Session Court, Petaling Jaya as ordered by the Sessions Court judge;

(d) the learned counsel for the plaintiff repeated and stressed his point that by virtue of the defendants' counterclaim against the plaintiff, the plaintiff has become a defendant whose address is in Temerloh and that being the case, the plaintiff comes within the scope of s. 2(b) of the 3rd schedule of the Subordinate Courts Act 1948. Therefore, he contended that the summons was rightfully filed at the Sessions Court, Temerloh;

(e) the Order of the learned Sessions Court judge was wrong because the cause of action and the facts shows that the correct forum should be Besut, Terengganu.

Intervention By The Court

At this stage, when the court pointed out to the plaintiff's counsel that it was the plaintiff himself who had filed the summons at the Sessions Court, Temerloh instead of the Sessions Court, Kuala Terengganu, the learned counsel immediately informed the court that he was withdrawing that ground of submission.

(f) urged this court to allow the appeal and to direct that an early date be fixed and that the case proceed at the Sessions Court, Temerloh.

Submission Of Defendants' Counsel

On the other hand, the learned counsel for the defendants submitted, *inter alia*, as follows, in addition to the grounds contained in the said affidavit of the defendants:

(a) the summons ought to have been filed in the district in which the defendants reside or has his place of business, or for other reasons it is desirable in the interest of justice that the proceedings should be instituted at the Sessions Court, Shah Alam and relied on s. 2(b) and (e) of the 3rd schedule of the Subordinate Courts Act 1948;

(b) that the defendants have their place of business in Petaling Jaya and the defendants' witnesses work in Petaling Jaya and if the case is heard in the Sessions Court, Temerloh, the defendants will be forced to incur heavy expenses to bring the witnesses to the Sessions Court, Temerloh;

(c) since the previous payments to the plaintiff have been made and paid to the account of the plaintiff's bank in Kapar, Selangor and the cause of action of the plaintiff is for the failure to pay the amount, the cause of action arose in the district of Petaling Jaya, in the state of Selangor;

(d) the defendants did not apply to transfer the proceedings to the Sessions Court, Petaling Jaya but instead to the Sessions Court, Shah Alam as they had received information that the civil cases were not heard in the Sessions Court, Petaling Jaya but instead in the Sessions Court, Shah Alam;

(e) that at the time when the plaintiff instituted the action and filed the summons against the defendants, there was no counterclaim as yet and the plaintiff had no prior knowledge whether there will be a counterclaim by the defendants, and therefore the fact that the defendants have included the counterclaim against the plaintiff does not change the capacity or position of the plaintiff in the original summons which was instituted against the defendants;

(f) that the fact that the plaintiff has purportedly become a defendant in the counterclaim is insignificant in so far as the 3rd schedule of the said Act is concerned;

(g) the learned counsel relied on s. 2(1)(a), (b) and (e);

(h) in support of her arguments, the learned counsel for the defendants relied on two cases namely *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 AMR 2501 and *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1998] 2 MLJ 268;

(i) that the plaintiff's appeal should be dismissed with costs.

Reply Of Plaintiff's Counsel

In reply to the submissions of the defendants' counsel:

(a) the plaintiff's counsel distinguished the facts in the *Malacca Securities Sdn Bhd* case and said that case was related to the sale of shares and that the transfer of proceedings were in respect of the jurisdiction of the High Court and that case has no application to the appeal before this court. He also referred to the case of *Tung Lian Enterprise v. Poly Trading Company* [1993] 4 CLJ 189;

(b) that the defendants had filed the application for the transfer of proceedings only after having filed the statement of defence and the counterclaim. In the circumstances, the position of the plaintiff has

changed to that of a defendant and by virtue of that, the plaintiff's address has become the address of that of a defendant in the counterclaim which is Temerloh and this factor ought to be taken into consideration;

(c) it will cause inconvenience and heavy burden on the plaintiff to travel to Petaling Jaya to defend the counterclaim;

(d) the criteria to decide on the correct forum is not the place where the payment to the plaintiff was made by the defendants but according to the said 3rd schedule.

Poser By Court

As soon as both parties had completed their submissions, this court posed a question as follows:

> whether s. 2(1)(a) to (e) of the 3rd schedule of the Subordinate Courts Act 1948 should be read conjunctively or disjunctively?

Both counsels replied that s. 2(1)(a) to (e) should be read disjunctively. The plaintiff's counsel, infact admitted that any one of the conditions as stated in s. 2(1)(a) to (e) will suffice to transfer the proceedings.

Whether Conjunctively Or Disjunctively

This court is of the view that the conditions in s. 2(1)(a) to (e) of the 3rd schedule should be read disjunctively as the word 'OR' is stated immediately after every condition stipulated therein. Infact, for the purpose of clarity, it is important to set out the provisions of s. 2(1)(a) to (e).

> (1) Power to stay proceedings unless they have been instituted in the District in which:
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> (a) the cause of action arose, or
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> (b) the defendant resides or has his place of business, or
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> (c) one of several defendants resides or has his place of business, or
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> (d) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (e) for other reasons it is desirable in the interest of justice that the proceedings should be had.

In this case, conditions (b) and (e) are in favour of the defendants that the proceedings should be heard in Petaling Jaya as ordered by the Session Court judge as the defendants' place of business and the residence of the witnesses are in Petaling Jaya which is not disputed by the plaintiff.

In *Chap Thian Holding Sdn Bhd v. Unknown Person (That Squatted On Lot 392, Lot 393, Lot 511, Lot 513, Lot 514 and Lot 1455, Section 4, Bandar Butterworth, Daerah Seberang Perai, Negeri Pulau Pinang) vide* Taiping High Court Originating Summons No: 24-52-93 (T) (unreported), His Lordship, Dato' Hj Abdul Malik b Hj Ishak J dealt with an application to transfer the originating summons from the High Court, Taiping to the High Court, Penang. In that case, the relevant provision of the law was s. 23(1) of the Courts of Judicature Act 1964 which read as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated.
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> within the local jurisdiction of the court and notwitstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

Interpretation Of Section 23(1) CJA 1964

In interpreting s. 23(1) of the Courts of Judicature Act 1964, for the purpose of the transfer of proceedings, His Lordship said that the clear and unambiguous wordings of the s. 23(1) of the Courts of Judicature Act 1964 should be given judicial effect. The condition set out in (a) to (d) of s. 23(1) of the Courts of Judicature Act 1964 are to be read disjunctively and, thus, the existence of any one of the conditions would be sufficient to attract the local jurisdiction of any particular High Court.

Decision Of This Court

In the appeal before this court, the plaintiff's address in Temerloh is not a condition or requirement under s. 2(1) of the 3rd schedule of the Subordinate Courts Act 1948 in order to decide the forum in which the summons ought to be instituted. It is also the view of this court that the fact that the defendants had filed a counterclaim against the plaintiff which was included in the statement of defence does not in any way change the position of the plaintiff for the purposes of determining the forum or give

effect that s. 2(1)(b) was meant for a plaintiff who has received a counterclaim against him which was included in the statement of defence as a defence to the plaintiff's action. The words in s. 2 of the 3rd schedule are clear and without any ambiguity and this court must give it a purposive interpretation to those literal words without inserting to cause a different situation or condition as argued by the plaintiff's counsel.

Section 17A of the Interpretation Act 1948 and 1967 reads as follows:

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In the circumstances, the appeal is dismissed with costs as the defendants have satisfied conditions (b) and (e) of s. 2(1) of the 3rd schedule of the Subordinate Courts Act 1948.